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VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Business Data Services in an Internet Protocol Environment, WC Docket No. 16-143; Technology Transitions, GN Docket No. 13-5; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353; Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, RM-11358; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593

Dear Ms. Dortch:

In the *Technology Transitions Order*, the Commission determined that the interim rule[1] requiring incumbent LECs seeking Section 214 authority to discontinue a TDM-based commercial wholesale platform voice service that is currently used as a wholesale input by competitive carriers to provide competitive carriers with reasonably comparable access on reasonably comparable rates, terms, and conditions was necessary to preserve competition in the multi-location voice services market.[2] On March 30, 2017, the Commission released a draft *Business Data Services Order* ("*Draft Item*") that would abruptly end—without any transition period—this regulatory backstop without providing any evidence to support the conclusion that doing so would adequately preserve competition. To the contrary, as explained further below, the record shows that the interim rule continues to be necessary. Because the *Draft Item* fails to provide any persuasive reasons for "permanently terminat[ing] the interim rule as

[1] 47 C.F.R. § 63.71(d) (the "interim rule").
[2] *In re Technology Transitions*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372, 9446-50 ¶¶ 135-140 (2015) ("*Technology Transitions Order*").

expeditiously as possible,"[3] the Commission should not eliminate the interim rule as proposed in the *Draft Item*.

Granite continues to believe the most appropriate course is to maintain the interim rule until the Commission has conducted an analysis of competition in the relevant market and determined that the rule can be eliminated without harming the customers that purchase multi-location business voice services today. However, in the interest of compromise, Granite proposes that the Commission maintain the rule for a multi-year period (e.g., until December 31, 2019). Adopting this brief transition period would give ILECs the near-term concrete end to the interim rule they desire while also providing competitive providers, the thousands of customers they serve, a reasonable time to adjust the new environment. Customers of competitive providers have expressed significant concern about signing new agreements in the absence of some assurance that competitive providers will be able to purchase replacement voice services in the event that TDM business voice services are discontinued—concerns that have been exacerbated by one ILEC's refusal to engage in negotiations with competitive carriers about access to replacement IP voice services despite that ILEC's widespread public pronouncements about a rapid transition from TDM to IP. Indeed, some of Granite's customers have been told by the ILEC that replacement IP voice services will *not* be made available to competitors. Maintaining the interim rule for a multi-year period, after which ILECs are expected to have transitioned a substantial portion of their networks to IP, would allow time for the ILECs to develop and articulate the terms of their IP offerings to competing providers, eliminating much of the uncertainty that exists today and thereby substantially mitigating harm to customers and the ability of competitive providers to continue to serve them.

I. The Interim Rule Was Based on Well-Founded Concerns about Competition in the Multi-Location Voice Services Market.

The Commission concluded in the *Technology Transitions Order* that the interim rule was necessary to preserve competition for multi-location voice services, as Granite and other competitive providers that rely on ILEC wholesale inputs provide the only viable alternative to the ILEC in the vast majority of markets. The Commission's conclusion was based on a number of findings, each of which remains valid. First, the Commission found that competitive LECs need reasonable access to wholesale inputs from incumbent LECs in order to compete in the provision of multi-location voice services.[4] As explained more below, cable does not serve the vast majority of locations, and the cost of new builds in these markets is prohibitively expensive in light of the expected returns. Second, the Commission recognized the importance of competition in the provision of voice services to multi-location businesses and cited concerns—expressed both by large companies and by education, community and governmental organizations—that they would be harmed if competitive LECs were to lose access to wholesale platform

[3] *In re Business Data Services in an Internet Protocol Environment*, Report and Order, WC Docket No. 16-143, FCC-CIRC1704-04, ¶ 277 (2017) ("*Draft Item*").
[4] *Technology Transitions Order*, 30 FCC Rcd at 9454-55 ¶ 148.

services.[5] Finally, the Commission concluded that the technology transition posed a threat to the continued availability of such wholesale inputs because ILECs could conceivably discontinue those services and leave competitive providers with no ability to serve their customers.[6]

II. The *Draft Item* Fails Adequately to Explain its Departure from the Concerns on which the Interim Rule Was Based.

The Commission decided to leave the interim rule in place until the completion of the special access proceeding on the understanding that this proceeding would provide an opportunity to "reassess the efficacy and necessity of the" interim rule and to "reevaluate [the] appropriate duration" of the rule.[7] However, that reevaluation, as reflected in the *Draft Item*, is flawed. As explained below, the Commission offers no reasonable basis for its conclusion that—contrary to the rationale for the interim rule set forth in the *Technology Transition Order*—ILECs now have the incentive to offer wholesale platform services for IP voice on reasonable rates, terms, and conditions. And in the absence of such evidence, eliminating the regulatory backstop that the Commission adopted in 2015 is arbitrary and capricious.

Through multiple filings in this proceeding, Granite has demonstrated that the competitive concerns that underlay the interim rule remain true today: the only viable source of connectivity to multi-location business customers in any particular area is the ILEC, and it is beyond dispute that ILECs have a monopoly over access inputs in the majority of locations.[8] As the Commission has previously recognized, a monopolist has the incentive to raise rivals' costs by overpricing, denying, delaying, or degrading access to inputs.[9]

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[5] *Id.* at 9453-54 ¶ 147.

[6] *Id.* at 9456 ¶ 149. Indeed, the Commission recognized that "competition may be lost irrevocably due to the absence of workable wholesale inputs" if this were to occur. *Id.* ¶ 151.

[7] *Id.* at 9457 ¶ 152. Such a "reevaluation" was necessary because the special access proceeding does not encompass multi-location voice services. As a result, tying the duration of the interim rule to the completion of the special access proceeding posed the risk that the rule would sunset without the Commission having assessed whether business customers would be harmed by the elimination of competition for multi-location voice services. Indeed, the Commission candidly acknowledged this problem. *Id.* at 9496 ¶ 242.

[8] *See* Letter from Thomas Jones to Marlene Dortch, GN Docket No. 13-5 (June 3, 2015) (showing that cable company facilities do not reach and cannot economically be deployed to reach the majority of Granite customer locations) ("June 3 *Ex Parte*").

[9] *See, e.g.*, *In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8640 ¶ 34 (2010) ("[T]here is no reason to expect [the ILEC] to offer [wholesale] services at 'competitive' rates. Rather, . . . we would expect it to exploit its monopoly position as a wholesaler and charge supracompetitive rates, especially given that (absent regulation) Qwest may have the incentive to

Moreover, as Granite has explained, ILECs have in some cases already acted on these incentives, requiring Commission intervention to prevent harm to the market.[10] The Commission was able to do so only because the TDM voice services at issue were governed by Sections 201, 202, and 208 of the Act. But because IP voice services have not been classified as telecommunications services under Title II of the Act, those protections do not currently apply. Thus, the transition from TDM to IP would free the ILECs to exploit their monopoly over inputs, which—as recognized by the Commission in the *Technology Transition Order*—competitive LECs must be able to access in order to preserve competition in the provision of multi-location business voice services. Maintaining the regulatory backstop created in that order therefore continues to serve an important role in ensuring that ILECs provide reasonable access to wholesale inputs.

The Commission offers several bases for its conclusion that it should eliminate the interim rule's protection, but none has merit.

First, the Commission asserts that maintaining the regulatory backstop will undermine facilities-based investment.[11] In so doing, the Commission relies on its conclusion in the *Triennial Remand Order* that the UNE-P requirement created a disincentive for competitive LECs to invest in infrastructure. But the UNE-P rules are not analogous to the interim rule in this regard. The UNE-P rules required that ILECs offer wholesale voice service on low, regulated rates based on forward-looking costs. It was these low, regulated rates that the Commission found to create a disincentive for competitive LECs to invest in infrastructure.[12] In contrast, the wholesale access interim rule requires only that ILECs charge rates that are "reasonably comparable" to unregulated rates that the ILECs themselves set. Moreover, these prices would apply to IP-based services that *cost less* to provide than the TDM services. The *Draft Item*, therefore, articulates no reasonable basis to conclude that the interim rule operates to disincentivize investment.

Second, the Commission points out that its obligation under the statute is limited to protecting efficient competition, not competitors, thereby implying that competition could continue to exist absent the availability of ILEC wholesale platform services.[13] But insofar as Granite is aware, the only competitors in this market for multi-location voice services are the CLECs that rely on ILEC wholesale platform services. Even ILECs generally do not offer a single, national offering for multi-location voice service; they generally limit their stand-alone business voice service offerings to their own ILEC regions. If the platform services are eliminated, "competition" (not just individual competitors) will be eliminated, and companies

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foreclose competitors from the market altogether."), *aff'd*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

[10] *See* Letter from Eric J. Branfman to Marlene Dortch, GN Docket No. 13-5 (Sept. 22, 2015).

[11] *Draft Item*, FCC-CIRC1704-04, ¶ 276.

[12] *In re Unbundled Access to Network Elements*, Order on Remand 20 FCC Rcd 2533, 2652-53 ¶ 218 (2005), *aff'd*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[13] *Draft Item*, FCC-CIRC1704-04, ¶ 278.

such as Starbucks, Sears, Bed Bath and Beyond, Panera, Tory Burch, and Simon Properties and education, community, and governmental organizations such as the YMCA of San Francisco, Scholastic, and the Washington Metropolitan Area Transit Authority[14] will lose the benefits of competitive choice and will no longer have the ability to purchase voice services across multiple jurisdictions from a single provider.

Third, the Commission faults Granite and other parties for failing to document the competitive impact of losing the regulatory backstop.[15] The Commission asserts that competitors have failed to quantify how many of their customers would become uneconomical to serve without the interim rule. But this asks too much: predicting what prices ILECs would charge for IP wholesale service or the specific non-price terms and conditions that they would impose (assuming they offer IP voice services on a wholesale basis at all) would require a crystal ball. Perhaps more importantly, AT&T, the largest ILEC in the country has refused to confirm that it will even provide comparable services in IP, thus creating significant uncertainty that inhibits the ability of providers that rely on wholesale inputs from ILECs to maintain long-term customer contracts.[16]

Nevertheless, Granite did as much as was possible to document the harms posed by the elimination of the interim rule. It did this by assessing the availability of voice service offerings from cable companies, the only conceivable alternative to the ILECs. That analysis showed that 85% of Granite's customer locations are not served by cable, that cable companies would therefore need to construct new facilities to reach the customers, and that facilities construction would be either impossible or uneconomical at the majority of those 85% percent of customer locations.[17] Granite concluded that "[i]n 51%-85% of our customer locations, the ILEC will be the only provider available to the small business market, if wholesale use of RBOC/ILEC network is not continued."[18] No party has questioned the validity of this conclusion.

The *Draft Item* also faults competitors for failing to show how they would choose among constructing their own facilities, reselling cable voice service, and reselling ILEC voice service in the absence of the regulatory backstop. The Commission fails to recognize, however, that none of these is a viable option in most circumstances. With respect to facilities construction, in most Granite customer

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[14] As the Commission recognized, all of these entities expressed concerns regarding the harms they would experience if multi-location voice service competition were to be undermined. *See Technology Transitions Order*, 30 FCC Rcd at 9453-54 ¶ 147.
[15] *Draft Item*, FCC-CIRC1704-04, ¶ 278.
[16] *See* Letter from Michael Galvin to Marlene Dortch, GN Docket No. 13-5 (Mar. 14, 2014); Letter from Michael Galvin to Marlene Dortch, GN Docket No. 13-5 (May 23, 2014); Letter from Thomas Jones to Marlene Dortch, GN Docket No. 13-5 et al. (Apr. 5, 2016); Letter from Paula Foley to Marlene Dortch, GN Docket No. 13-5 et al. (July 25, 2016).
[17] Attachment to June 3 *Ex Parte*.
[18] *Id.*

locations the customer purchases only a small number of voice connections, and those connections do not generate sufficient revenue to justify deployment of new loops.[19] Indeed, the *Draft Item* itself confirms the logic of this conclusion.[20] Resale is likewise not an economically viable means of competing, because ILECS are not required to offer VoIP for resale at a discount and, as explained, there is no basis for concluding that ILECs will voluntarily offer business IP voice service on reasonable terms and conditions (if they offer it at all). In any event, Granite has shown that even the mandated resale discount for TDM-based voice service is too low to support a viable competitive offering.[21]

Finally, the *Draft Item* faults competitors for failing to show how these issues would affect overall competition in the market. But making such a showing would require information not available to Granite or any other competitive LEC. Indeed, competitive providers urged the Commission to undertake a review of the market—as opposed to simply dismissing customer concerns—precisely because the Commission is able to gather such information in a way that competitive LECs cannot. Here again, however, Granite did as much as possible to gauge the harm caused by eliminating the interim rule—by submitting an economic study demonstrating that the total harm to consumer welfare of eliminating the regulatory backstop would be between $4.443 billion and $10.168 billion per year.[22] Nothing in the record contradicts that study. The *Draft Item* also completely ignores input reflected in over 185 letters from small and mid-sized business customers who wrote in support of maintaining competitive policies in these areas, the concerns expressed to the FCC from Chief Information Officers of three customers (Brooks Brothers, Pier 1 Imports, and Simon Properties) about the continued need for pro-competitive policies for voice services, and comments from competitive providers who have attested to the lack of competitive options and the need for continued pro-competitive policies.

Moreover, the *Draft Item* acknowledges that there are few competitive options for higher bandwidth business data services, and therefore leaves regulatory protections in place, but fails to credit the logical implication of that conclusion—that there are even fewer competitive options for lower bandwidth services such as the voice services that Granite provides. In these circumstances, relying on the absence of additional evidence from the FCC's failure to undertake an analysis of competition in the relevant market to support a flash cut to withdrawal of the regulatory backstop is arbitrary and capricious.

<u>Fourth</u>, the Commission asserts that Granite's conclusion that it could not compete by relying on resold ILEC services is unpersuasive because Granite has not proven that it would be required to rely on resold services if the regulatory backstop were eliminated. But, as explained above, ILECs are not required to offer VoIP for resale, and the elimination of the backstop would create a significant risk that the ILECs would refuse to offer wholesale IP voice services on reasonable rates, terms, and conditions.

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[19] *Id.*
[20] *Draft Item*, FCC-CIRC1704-04, ¶¶ 276-280.
[21] *See* Letter from Michael Galvin to Marlene Dortch, GN Docket No. 13-5 (Oct. 23, 2015).
[22] *See* Letter from Michael Galvin to Marlene Dortch, GN Docket No. 13-5 (June 12, 2015) ("June 12 *Ex Parte*").

Fifth, the Commission finds unpersuasive the economist study that showed the harm to consumer welfare of eliminating the regulatory backstop because the study's assumption that competitive carriers provide $30 per line in value to their customers is "remarkable" and is not supported by "particularized or verifiable support."[23] In fact, there is nothing "remarkable" or implausible about the conclusion that competitive LECs provide customers $30 per line in benefit given the extent to which those customers are eager to abandon the ILECs' poor service quality in favor competitive LECs' offerings. Granite alone serves over 1.4 million business lines, over 80 Fortune 100 companies, and a total of approximately 4,800 business customers. Moreover, the estimated $30 benefit per line was supported by two sworn declarations submitted by Granite executives with expertise in the benefits of Granite's service offerings.[24] These declarations provide more than sufficient support for the $30 benefit.

Sixth, the *Draft Item* makes a sudden and inadequately explained departure from the *Technology Transitions Order* by asserting that there is no basis for concluding that ILECs will cease offering wholesale voice services after the transition to IP.[25] The interim rule was predicated precisely upon the concern that ILECs might cease to offer such services after transitioning to IP. In support of the Commission's retreat from this conclusion, the *Draft Item* relies on ILECs' conduct in providing TDM wholesale voice services and then leaps to the conclusion that the ILECs will continue to offer similar wholesale voice services in IP. But as explained above, Granite has already been subjected to ILEC market power abuse in the provision of TDM-based services that required Commission intervention. More importantly, the Commission fails to account for the fact that the ILECs' TDM services are subject to Sections 201, 202, and 208, whereas the applicability of those provisions to IP voice services remains an open question, and further fails to account for the fact that the largest ILEC in the country has thus far refused to offer replacement services in IP. It is also inconsistent with the Commission's longstanding recognition of monopolists' incentives to use their control over key inputs to increase rivals' costs. The *Draft Item* identifies no changed circumstances or new evidence in the record to allay these concerns, instead effectively abandoning *sub silentio* the reasoning that animated adoption of the interim rule in the first instance.

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[23] *Draft Item*, FCC-CIRC1704-04, ¶ 279.

[24] Jorge DeJesus, Vice President of Financial Planning and Analysis at Granite, described the methodology he and his team used to calculate the $30 estimate. This included calculating the difference between the average ILEC per line tariffed charges for business voice service and the Granite per line charges in each ILEC territory and estimating the cost savings per line that result from the features of Granite service, such as eliminating the need for customers to purchase service from multiple vendors and consolidated billing, maintenance, and repair. *See* Declaration of Jorge DeJesus ¶¶ 3-4, attached to June 12 *Ex Parte*. Kevin Nichols, Senior Vice President of Sales at Granite, explained that, based on his experience selling business voice services, the combination of lower prices and superior service quality provided by Granite and other competitive LECs results in approximately $30 in value per line. *See* Declaration of Kevin Nichols ¶ 7, attached to June 12 *Ex Parte*.

[25] *Draft Item*, FCC-CIRC1704-04, ¶ 280.

III. The Commission Should Revise the *Draft Item* to Provide for a Multi-Year Transition Period.

In view of the unrebutted evidence in the record regarding the importance of the regulatory backstop adopted in the *Technology Transitions Order* to sustaining competition in the market for multi-location business voice services and the Commission's failure to provide a reasoned basis for eliminating that backstop, Granite urges the Commission not to eliminate the interim rule as proposed in the *Draft Item*. Granite has previously explained that the Commission should not eliminate the interim rule unless and until it has conducted a thorough analysis of competition in the relevant market and determined the extent to which it can be eliminated without harming the businesses and education, community, and governmental organizations that purchase multi-location business voice services today.

In the interest of compromise, however, Granite asks that the Commission allow for a more gradual transition away from the interim rule, maintaining the rule for a multi-year time-period, such as until December 31, 2019. Adopting this transition period would give carriers and their customers much-needed time to adjust their businesses to the IP environment. Today, customers of competitive providers express significant concern about signing new agreements in the absence of some assurance that competitive LECs will be able to purchase ILEC IP voice services in the event that TDM business voice services are discontinued. At least one ILEC has even suggested to customers of competitive providers that such IP voice services will *not* be made available to competitive providers. A flash-cut transition would exacerbate this considerable uncertainty, harming customers and impinging competitive providers' ability to serve them.

Maintaining the interim rule until the end of 2019 would mitigate much of these harms. Even though that is only a little over two years away, ILECs are expected to have transitioned a substantial portion of their networks to IP by then. It is thus highly likely that the IP services ILECs offer to competitive providers—and the associated terms and conditions—will have largely been routinized, eliminating much of the uncertainty that exists today and allowing for much smoother negotiations. And competitive providers and their customers will have a reasonable period of time to plan for elimination of the interim rule. Indeed, in other contexts where significant market changes will result from Commission action, then-Commissioner Pai expressed his support for reasonable transition periods on more than one occasion.[26] Such a transition period is particularly warranted here, where services to businesses, schools, hospitals, and libraries for telecommunications and broadband services will be affected.

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[26] *See In re Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Commc'ns*, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, 31 FCC Rcd 5817, 5946 (2016) (Statement of Commissioner Ajit Pai, Concurring in Part and Dissenting in Part) ("And second, the Order now provides a more reasonable transition period for providers to comply with the new reporting requirements—a change that both Commissioner O'Rielly and I urged our colleagues to make."); *In re Rates for Interstate Inmate Calling Servs.*, Second Report and Order and Third Further

In sum, the short transition period we proposed for the withdrawal of the interim rule would provide a balanced deregulatory approach that would give competitive providers and their customers an adequate period of time to adjust to market changes while at the same time establishing a date-certain for the elimination of the requirement desired by ILECs.

Please contact me if you have any questions regarding these matters.

Sincerely,

/s/ Samuel L. Feder

Samuel L. Feder
Counsel for Granite Telecommunications, LLC

Notice of Proposed Rulemaking, 30 FCC Rcd 12,763, 12,968 (2015) (Dissenting Statement of Commissioner Ajit Pai) ("The Order's transition period is also problematic. . . . How the Commission intends inmate calling service providers to renegotiate contracts (and these payments) with the 1,491 prisons in the country in 90 days, let alone the 3,724 jails in six months is beyond comprehension. Nor is there any precedent for such an abbreviated transition." (footnote omitted)); FCC News Release,*Statement of FCC Commissioner Ajit Pai Announcing His Plan to Support Broadband Deployment in Rural America*, 2015 WL 3964819, at *2 (June 29, 2015) ("If a carrier's support would decrease under the A-CAM, I believe a five-year transition period—two more than the FCC gave price-cap carriers—is appropriate, and I believe there should be no limit on participation for such carriers.").